DUBON BHD v. WISMA COSWAY MANAGEMENT CORPORATION

FEDERAL COURT, PUTRAJAYA
AZAHAR MOHAMED CJ (MALAYA)
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 02(f)-50-05-2019(J)]
21 MAY 2020
[2020] CLJ JT(3)

COMPANY LAW: *Winding up – Proceedings against company – Leave to proceed claim against company as proprietor – Application for – Management corporation claimed for outstanding sums due and owed by company – Whether management corporation entitled to recover from proprietor guaranteed sum – Strata Management Act 2013, s. 77*

LAND LAW: *Strata title – Management corporation – Claim for outstanding sums due and owed by company as proprietor – Whether management corporation entitled to recover from proprietor guaranteed sum under s. 77 of Strata Management Act 2013 – Whether there was mandatory obligation on proprietors to pay amount incurred by management corporation in course of exercise of carrying out duties – Whether proprietors must settle outstanding amount before selling or transferring properties*

STATUTORY INTERPRETATION: *Interpretation of Act – 'shall by virtue of this section be guaranteed by the proprietors' – Strata Management Act 2013, s. 77 – Whether there was mandatory obligation on proprietors to pay amount incurred by management corporation in course of exercise of carrying out duties – Whether proprietors must settle outstanding amount before selling or transferring of properties – Whether condition precedent in legal documents of transfer or sales of strata unit shares*

The appellant ('company') was the beneficial owner of a lot ('unit') in Wisma Cosway while the respondent was the management corporation ('MC') of Wisma Cosway. The company was wound up and as part of the process of realising the company's assets, including the unit, the liquidators required the execution of the transfer of the unit into the company's name for the sale of the property. The request was made to one Stephens Properties Sdn Bhd ('Stephens'), which had developed Wisma Cosway. However, Stephens refused to execute the transfer unless the company first obtained a clearance letter from the MC in relation to an outstanding sum of RM183,070.26 ('outstanding sum'). The company denied the claim and argued that (i) it was

not liable to pay the sums sought by Stephens and the MC as the company was in liquidation and any payment of its liabilities was subject to the availability of funds for unsecured creditors; and (ii) any such payment had to adhere to the order of priority of creditors who had proven their debts as well as the *pari passu* rule and, in this context, the MC had not filed any proof of debt with the liquidator. When no resolution was reached, the company filed a claim at the Strata Management Tribunal ('ST proceedings') seeking an order that (i) Stephens be directed to execute the memorandum of transfer without imposing any administrative and application fees; and (ii) the MC issue the clearance letter upon the company's payment of a sum of RM43,805.34. The MC counterclaimed for the sum it was owed and followed this up with an application in the winding-up court for leave to commence or proceed with its counterclaim in the ST proceedings under s. 226(3) of the then Companies Act 1965 ('CA 1965'). The High Court refused the MC's application for leave to commence or proceed with any action against the company on the grounds that (i) the requirements for leave to proceed against the company in liquidation had not been met as the only issue between the company and the MC was whether the company was bound to pay the outgoings claimed by the MC; and (ii) the MC's claim was bound to fail. However, the decision was reversed upon appeal to the Court of Appeal. Allowing the MC's appeal and granting leave to proceed against the company in liquidation to recover the sums of money stated to be due and owing to it, the Court of Appeal decided that, *inter alia*: (i) s. 77 of the Strata Management Act 2013 ('SMA') provides that the amount due to the MC is a 'guaranteed sum' and therefore a valid point of law arose which required ventilation. This point of law was whether the MC would remain an unsecured creditor who was entitled together with other unsecured creditors to the remaining assets of the company on a *pari passu* basis, or be elevated to the status of secured creditor of the company by virtue of the fact that the monies owed by the company to it was a 'guaranteed sum' under s. 77 of the SMA; (ii) while the test relating to the grant of leave to commence or proceed against a company in liquidation was not in dispute, the MC was entitled under the SMA to recover the guaranteed sum in the Tribunal as a debt due and owing to it; and (iii) as s. 77 of the SMA utilises the word 'shall', it imposed a mandatory obligation on the proprietor, in this case the company, to pay any outstanding amount due to the MC before the property was disposed of to third parties. Hence, the present appeal. The question that arose was whether the right of a joint management body or a management corporation to collect and receive payment from a proprietor under ss. 33 and 77 of the SMA, respectively, gives it a lawful preference as a secured creditor over the assets of a company in liquidation.

A B C D E F G H I

Held (allowing appeal, setting aside decision of Court of Appeal and restoring order of High Court; answering leave question in the negative) Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The CA 1965 and the Companies Act 2016 ('CA 2016') now in force provide a comprehensive regime relating to the law of insolvency upon a company being wound up. These statutes contain similar statutory provisions in relation to the priority of payments due to secured and unsecured debtors in liquidation. Those provisions are s. 292 under the CA 1965 and s. 527 under the CA 2016. Section 292, which was applicable at the material time, provided that after the payment of preferential debts, the liquidator acts to safeguard the interest of the unsecured creditors. That, in turn, was ensured by the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors. (paras 24 & 25)

(2) Section 77 of the SMA neither dislodges the statutory priority regime in the Companies Act nor elevates the payment of management fees to the status of a secured debt. At best, the word 'guarantee' in s. 77 of the SMA denotes a statutory obligation between the MC and a parcel proprietor, entitling the MC to recover maintenance and other related service charges from a parcel proprietor. This is reinforced by sub-s. (3) of s. 77 which refers to the sum due from a parcel proprietor to the MC as a debt which is actionable by the MC *via* a suit filed in court or in the strata tribunal. That right to sue for a debt is a right *in personam* and not a right *in rem*. The MC, therefore, enjoys a right *in personam* to recover the debt from the parcel proprietor. It goes no further than that. (paras 27-29)

(3) There is nothing in the language of s. 77 which even makes reference to or purports to oust such insolvency principles. That is because s. 77 was never crafted nor intended to encroach upon, or disrupt the priority regime in the Companies Act. Any provision which seeks to achieve priority could only be done by way of statutory provision and that too, *via* positive, clear and unambiguous words. It is evident from a perusal of s. 77 that Parliament never intended to displace any part of the statutory insolvency regime. (para 30)

(4) Section 77 serves to statutorily provide that the non-payment of management fees creates an undisputed debt. The term 'guaranteed' ensures the fact of the existence of such a debt. It ensures that parcel proprietors do not evade their obligations to make such payments. The recovery of such debts is thus assured and could simply be effected under the section. As such, a reading of s. 77 which purports to accord such a debt priority on a parity akin to a secured debt is to comprehend and misconstrue both the effect of the section and the statutory

insolvency regime in this jurisdiction. Ultimately, s. 77 was never intended to, and does not go further than ensuring a fail-safe method of recovering management fees as an undisputed debt from parcel proprietors at the behest of the MC. It followed that when s. 77 is construed in the context of the entirety of the SMA, and in light of the general regime of insolvency law as set out in the Companies Act, the outstanding sum payable to the MC was not a secured debt. It was guaranteed debt *vis-à-vis* the company and the MC, which was a different matter altogether. It had no effect on the rights of third party creditors, such as secured creditors or other unsecured creditors. (paras 31-34)

(5) The use of the word 'guaranteed' in the SMA ensures and assures straightforward recovery of the debt claimed by the MC. The fact of the existence of a debt is easily established and payment due 'guaranteed'. What may well remain in issue was limitation. That issue was a matter of law and may be resolved without difficulty. It was certainly not a complex issue that required adjudication in a court of law. There was no exceptional issue in this case that precluded the respondent from filing a proof of debt in the winding-up court. There was no necessity for the grant of leave. (paras 40 & 42)

Bahasa Melayu *Headnotes*

Perayu ('syarikat') ialah pemilik benefisial satu lot ('unit') di Wisma Cosway sementara responden ialah perbadanan pengurusan ('PP') Wisma Cosway. Syarikat tersebut digulung dan sebagai sebahagian proses merealisasikan aset-aset syarikat, termasuk unit, pelikuidasi menghendaki pelaksanaan pindah milik unit kepada nama syarikat demi jualan hartanah. Permohonan ini dibuat pada Stephens Properties Sdn Bhd ('Stephens'), yang membangunkan Wisma Cosway. Walau bagaimanapun, Stephens enggan melaksanakan pindah milik kecuali jika syarikat terlebih dahulu mendapatkan surat pelepasan daripada PP berkenaan jumlah tertunggak sebanyak RM183,070.26 ('jumlah tertunggak'). Syarikat menafikan tuntutan dan menghujahkan bahawa (i) syarikat tidak bertanggungan membayar jumlah yang dituntut oleh Stephens dan MC kerana syarikat dalam likuidasi dan apa-apa bayaran tanggungannya tertakluk pada sama ada dana untuk pemiutang-pemiutang tidak bercagar; dan (ii) apa-apa bayaran demikian perlu mematuhi perintah keutamaan pemiutang yang telah membuktikan hutang mereka dan juga sebagai peraturan *pari passu* dan dalam konteks ini, PP belum memfailkan apa-apa bukti hutang pada pelikuidasi. Apabila tiada penyelesaian dicapai, syarikat memfailkan tuntutan di Tribunal Pengurusan Strata ('prosiding ST') memohon perintah agar (i) Stephens diarahkan melaksanakan memorandum pindah milik tanpa mengenakan apa-apa yuran pentadbiran dan permohonan; dan (ii) PP mengeluarkan surat pelepasan selepas syarikat membayar jumlah RM43,805.34. PP menuntut balas jumlah yang dihutangi padanya dan ini disusuli dengan permohonan di mahkamah

penggulungan untuk kebenaran memulakan atau meneruskan tuntutan balasnya dalam prosiding ST bawah s. 226(3) Akta Syarikat 1965 ('AS 1965') sebelum ini. Mahkamah Tinggi menolak permohonan PP untuk kebenaran memulakan atau meneruskan dengan apa-apa tindakan terhadap syarikat atas alasan (i) syarat-syarat kebenaran untuk meneruskan terhadap syarikat dalam likuidasi tidak dipenuhi kerana satu-satunya isu antara syarikat dengan PP adalah sama ada syarikat terikat membayar wang keluar yang dituntut oleh PP; dan (ii) tuntutan PP pasti gagal. Walau bagaimanapun, keputusan ini diakas susulan rayuan ke Mahkamah Rayuan. Membenarkan rayuan PP dan memberi kebenaran meneruskan terhadap syarikat dalam likuidasi untuk mendapatkan semula jumlah wang yang dinyatakan terhutang, Mahkamah Rayuan memutuskan, antara lain: (i) seksyen 77 Akta Pengurusan Strata 2013 ('APS') memperuntukkan bahawa jumlah yang terhutang pada PP ialah jumlah yang dijamin dan, berikutan itu, mempunyai hujahan undang-undang sah yang memerlukan perbincangan. Hujahan undang-undang ini ialah sama ada PP akan kekal sebagai pemiutang yang tidak bercagar yang berhak bersama-sama dengan pemiutang-pemiutang tidak bercagar lain atas aset-aset selebihnya milik syarikat atas dasar *pari passu* atau ditingkatkan ke status pemiutang bercagar syarikat berdasarkan fakta bahawa wang yang dihutangi oleh syarikat padanya ialah jumlah yang dijamin bawah s. 77 APS; (ii) walaupun ujian berkaitan pemberian kebenaran memulakan atau meneruskan terhadap satu syarikat dalam likuidasi tidak dipertikai, PP berhak bawah APS untuk mendapatkan semula jumlah yang dijamin dalam Tribunal sebagai jumlah yang terhutang padanya; dan (iii) oleh kerana s. 77 APS menggunakan perkataan 'hendaklah', ini mengenakan kewajipan pada pemilik, dalam kes ini syarikat, untuk membayar apa-apa jumlah tertunggak yang terhutang pada PP sebelum hartanah dilupus pada pihak ketiga. Maka timbul rayuan ini. Soalan yang timbul adalah sama ada hak satu-satu badan pengurusan bersama atau perbadanan pengurusan untuk mengutip dan menerima bayaran daripada pemilik bawah ss. 33 dan 77 APS, masing-masing, memberinya keutamaan sah bawah undang-undang sebagai pemiutang bercagar terhadap aset-aset syarikat dalam likuidasi.

Diputuskan (membenarkan rayuan, mengetepikan keputusan Mahkamah Rayuan dan mengembalikan perintah Mahkamah Tinggi; menjawab soalan kebenaran secara negatif)

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Akta Syarikat 1965 dan Akta Syarikat 2016 ('AS 2016') yang kini berkuat kuasa memperuntukkan rejim yang menyeluruh berkaitan undang-undang ketaksolvenan untuk syarikat yang digulung. Statut-statut ini mengandungi peruntukan-peruntukan statutori serupa berkaitan keutamaan bayaran terhutang untuk pemberi-pemberi hutang yang bercagar dan tidak bercagar dalam likuidasi. Peruntukan-

peruntukan tersebut adalah s. 292 AS 1965 dan s. 527 AS 2016. Seksyen 292 yang terpakai ketika itu, memperuntukkan bahawa selepas bayaran hutang keutamaan, pelikuidasi bertindak melindungi kepentingan pemiutang-pemiutang tidak bercagar. Ini seterusnya dijamin oleh kumpulan dan agihan aset-aset syarikat *pari passu* antara pemiutang-pemiutang tidak bercagar.

(2) Seksyen 77 APS tidak melucutkan rejim keutamaan statutori dalam Akta Syarikat mahupun menaikkan yuran pengurusan ke status hutang bercagar. Paling tidak, perkataan 'jamin' dalam s. 77 APS menandakan satu kewajipan statutori antara PP dan pemilik petak, memberi hak kepada PP mendapatkan semula caj penyenggaraan dan lain-lain perkhidmatan berkaitan daripada pemilik petak. Ini diperkukuhkan lagi oleh sub-s. (3) s. 77 yang merujuk jumlah terhutang oleh pemilik petak pada PP sebagai hutang yang boleh diambil tindakan oleh PP melalui guaman yang difailkan di mahkamah atau dalam tribunal strata. Hak menyaman untuk memperoleh hutang ialah hak *in personam* dan bukan hak *in rem*. Oleh itu, PP menikmati hak *in personam* untuk mendapatkan semula hutang daripada pemilik petak. Ini tidak melangkah selanjutnya daripada itu.

(3) Tiada apa-apa dalam bahasa s. 77 yang merujuk atau bertujuan menyingkirkan prinsip-prinsip ketaksolvenan. Ini kerana s. 77 tidak pernah digubal atau diniatkan untuk mencerobohi atau menggendalakan rejim keutamaan Akta Syarikat. Apa-apa peruntukan yang ingin mencapai keutamaan hanya boleh dilakukan melalui peruntukan statutori dan itu juga melalui perkataan-perkataan positif, jelas dan tidak kabur. Ini jelas berdasarkan penelitian s. 77 bahawa Parlimen tidak berniat menyingkirkan mana-mana bahagian rejim ketaksolvenan statutori.

(4) Seksyen 77 bertujuan memperuntukkan secara statutori bahawa kegagalan membayar yuran pengurusan membentuk satu hutang yang tidak dipertikai. Terma 'dijamin' memastikan fakta kewujudan hutang sedemikian. Ini memastikan pemilik-pemilik petak tidak mengelak kewajipan mereka membuat bayaran sedemikian. Oleh itu, pemerolehan semula hutang sedemikian terjamin dan boleh diberi kesan bawah seksyen. Oleh itu, pembacaan s. 77 yang bertujuan memberi hutang sedemikian keutamaan berdasarkan kesetaraan seperti hutang bercagar adalah untuk memahami dan tersalah tafsir kedua-dua kesan pada seksyen dalam rejim statutori ketaksolvenan dalam bidang kuasa ini. Asasnya, s. 77 tidak pernah diniatkan, dan tidak lebih daripada memastikan kaedah yang tidak akan gagal untuk mendapatkan semula yuran pengurusan sebagai hutang yang dipertikai daripada pemilik-pemilik petak atas perintah PP. Diikuti bahawa apabila s. 77 ditafsir dalam konteks keseluruhan APS dan melihat pada rejim am undang-

undang ketaksolvenan yang digariskan dalam Akta Syarikat, jumlah terhutang yang perlu dibayar kepada PP bukan hutang bercagar. Ini adalah hutang yang dijamin berkaitan syarikat dan PP, iaitu satu hal perkara lain sama sekali. Ini tiada kesan pada hak-hak pemiutang pihak ketiga, seperti pemiutang-pemiutang bercagar atau lain-lain pemiutang tidak bercagar.

(5) Penggunaan perkataan 'dijamin' dalam APS memastikan dan menjamin pemerolehan semula jelas dan mudah hutang yang dituntut oleh PP. Fakta kewujudan hutang dibuktikan dengan mudah dan bayaran terhutang 'dijamin'. Isu yang kekal ialah had masa. Isu ini satu hal perkara undang-undang dan boleh diselesaikan tanpa kepayahan. Ini bukan isu rumit yang memerlukan adjudikasi dalam mahkamah undang-undang. Tiada isu luar biasa dalam kes ini yang mengecualikan responden daripada memfailkan bukti hutang dalam mahkamah penggulungan. Tiada keperluan memberi kebenaran.

Case(s) referred to:

Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd [2018] 2 CLJ 401 CA ***(refd)***

Malaysian Trustees Bhd v. Transmile Group Bhd & Ors [2012] 3 MLJ 679 ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Re Cuthbert Lead Smelting Co Ltd [1886] WN 84 ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 226(3), 292(1)

Companies Act 2016, s. 527

Strata Management Act 2013, s. 77(1), (3)

For the appellant - Andrew Teh & Tan Chong Pei; M/s Wong Lu Peen & Tunku Alina
For the respondent - Siva Balan & Goh Wan Ping; M/s Mastura Partnership

[Editor's note: For the Court of Appeal judgment, please see Wisma Cosway Management Corporation v. Dubon Bhd [2019] 3 CLJ 240 (overruled); Appeal from High Court, Johor Bahru; Companies (Winding-Up) No. 28-187-1999 (4) & Post-Companies (Winding-Up) No. JA-28PW-99-11-2017 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] In the field of insolvency, the law on the rights of secured and unsecured creditors, as well as that relating to priorities and preference payments, is well-settled in statute, and consequently by case-law, which provides both certainty and judicial precedent.

[2] This appeal was necessitated by reason of a failure to apply these well-settled principles. This judgment serves primarily to restate certain fundamental principles of law in this area.

[3] The sole leave question allowed by this court on 9 May 2019, reads:

> Whether the right of a Joint Management Body or a Management Corporation to collect and receive payment from a proprietor under sections 33 and 77 of the Strata Management Act 2013 respectively, **gives it a lawful preference as a secured creditor over the assets of a company in liquidation**?
>
> (emphasis added)

[4] In essence, the question before us relates to whether s. 77 of the Strata Management Act 2013 ('SMA') has the effect of elevating the status of a debt incurred under it, to that of a secured or preferential debt within the insolvency regime, where the proprietor of the parcel concerned is in liquidation, or is bankrupt.

[5] In other words, do payments received or recovered by a management corporation ('MC') as a debt, from the proprietors of properties held under the SMA who are in liquidation or bankrupt, enjoy priority or preference over other creditors, equivalent to that accorded to secured creditors under an insolvency regime.

[6] This question requires a consideration of s. 77 of the SMA, and how its provisions are to be construed in light of the insolvency regime as statutorily governed at the material time by s. 292 of the Companies Act 1965 (now s. 527 of the Companies Act 2016).

[7] Section 77 of the Strata Management Act 2013 ('SMA 2013' or 'the Act') provides (in part):

> **Recovery of sum as a debt due to management corporation or subsidiary management corporation**
>
> 77. (1) The payment of any amount lawfully incurred by the management corporation or the subsidiary management corporation in the course of the exercise of any of its powers or functions or carrying out of its duties or obligations **shall by virtue of this section be guaranteed** by the proprietors for the time being constituting the management corporation or the subsidiary management corporation.
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (emphasis added)

[8] The principal argument in the courts below was that the phrase "shall by virtue of this section be guaranteed" in s. 77(1) of the SM A 2013 supports the interpretation that the monies outstanding and due to the MC or the Joint Management Body ('JMB') constitutes a debt which is accorded priority such that it enjoys the status of a secured debt within the insolvency regime.

[9] We heard this appeal on 5 November 2019, unanimously allowed it, and set aside the decision of the Court of Appeal. We answered the leave question in the negative, meaning that s. 77 SMA does not accord any form of priority or preference in relation to payments received by an MC from an insolvent parcel proprietor.

[10] This judgment states the reasons for our decision.

Salient Background Facts

[11] We adopt the summary of facts in both parties' submissions with modification. The appellant, Dubon Berhad (in liquidation) ('the company') is the beneficial owner of a lot known as Unit 22.05 ('the unit') in Wisma Cosway. The respondent, Wisma Cosway Management Corporation, is the management corporation of Wisma Cosway ('MC').

[12] The company was wound up by an order of the Johor Bahru High Court dated 18 January 2000. As part of the process of realising the company's assets, which included the unit, the liquidators required the execution of the transfer of the unit into the company's name. This was necessary for the purposes of a sale of the subject property. (The liquidators were exercising their statutory duties to sell the property so as to bring in and pay off the debts of the company in liquidation.)

[13] The request was made of one Stephens Properties Sdn Bhd ('Stephens'), which had developed Wisma Cosway. Stephens however refused to execute the transfer unless the company first obtained a "clearance" letter from the MC in relation to an outstanding sum of RM183,070.26 ('outstanding sum'). The outstanding sum comprised RM4,028 in "administrative and application fees" owed to Stephens ('Stephens' sum') and RM179,042.26 payable as outgoings and service charges in respect of Unit 20.25 owed to the MC ('MC's sum').

[14] The company through its liquidator denied the claim. It took the position that it was not liable to pay the sums sought by Stephens and the MC because the company was in liquidation, and any payment of its liabilities was subject to the availability of funds for unsecured creditors. Moreover, any such payment had to adhere to the order of priority of creditors who had proven their debts, as well as the *pari passu* rule. In this context, the MC had not filed any proof of debt with the liquidator.

[15] Negotiations ensued to resolve the impasse as the liquidator had to realise the company's assets, but no resolution was reached.

[16] The company then, through its liquidator, filed a claim at the Strata Management Tribunal at Putrajaya ('ST proceedings'), seeking *inter alia*, an order that:

(i) Stephens be directed to execute the memorandum of transfer without imposing any administrative and application fees; and

(ii) The MC issue the clearance letter upon the company's payment of a sum of RM43,805.34.

[17] The MC filed a counterclaim for the sum it was owed and followed this up with an application in the winding up court for leave to commence or proceed with its counterclaim in the ST proceedings under s. 226(3) of the then Companies Act 1965.

The Decision Of The High Court In Respect Of The MC's Application For Leave To Commence Or Proceed Against The Company Under Section 226(3) Of The Companies Act 1965 (Now Repealed)

[18] The High Court refused the MC's application for leave to commence or proceed with any action against the company. In declining to do so, the High Court held in summary that the requirements for leave to proceed against the company in liquidation had not been met. This was because the only issue between the company and MC was whether the company was bound to pay the outgoings claimed by MC, ie, whether that debt was due and payable. The High Court concluded that the MC's claim was bound to fail for two reasons:

(i) Any claim made by MC before 31 May 2011 was time-barred as at 31 May 2017 as no claim could be brought six years after the cause of action arose;

(ii) More significantly for the purposes of this appeal, MC is an unsecured creditor and the remaining assets of the company had to be distributed *pari passu* amongst its unsecured creditors. Any payment of the sums demanded by MC would amount to an undue preference in favour of MC which contravenes the statutory insolvency regime as prescribed at the material time under s. 292 of the Companies Act 1965 (and now s. 527 of the Companies Act 2016);

(iii) MC had not filed a proof of debt in relation to its claim and therefore sought to circumvent the prescribed winding-up process for creditors. The counterclaim sought to be brought was purely monetary in nature and MC ought to have filed a proof of debt to enable the liquidator to deal with it in the course of the winding-up process.

(iv) In totality, MC's claim was monetary and did not involve complex issues of fact or law. It could be sufficiently dealt with in the course of the winding-up process in the winding up court and did not require separate adjudication *albeit* in the Tribunal or any other court.

A **The Decision Of The Court Of Appeal**

[19] Dissatisfied, the company appealed to the Court of Appeal, which reversed the decision of the High Court and decided that this was a proper case to grant leave under s. 226(3) of the Companies Act 1965.

B **[20]** The Court of Appeal, in allowing MC's appeal and granting leave to proceed against the company in liquidation for the purposes of recovery of the sums of money stated to be due and owing to it, decided *inter alia*, that:

(i) Section 77 SMA provides that the amount due to the MC is a 'guaranteed sum' and therefore a valid point of law arose which required
C ventilation. This point of law was whether MC would remain an unsecured creditor who was entitled together with other unsecured creditors to the remaining assets of the company on a *pari passu* basis, or be elevated to the status of a secured creditor of the company by virtue of the fact that the monies owed by the company to it was a
D 'guaranteed sum' under s. 77 SMA;

(ii) While the test relating to the grant of leave to commence or proceed against a company in liquidation is not in dispute, the MC was entitled under the SMA to recover the guaranteed sum in the Tribunal as a debt due and owing to it; and

E

(iii) As s. 77 utilised the word 'shall' it imposed a mandatory obligation on the proprietor, here the company, to pay any outstanding amount due to the MC before the property was disposed of to third parties.

[21] The reasoning of the Court of Appeal in determining that this was a
F fit case for the grant of leave for MC to bring a claim against the company in a separate court, apart from the winding up court, runs awry of the settled and trite principles of insolvency law. This is so in two respects, namely:

(i) The law relating to the grant of leave to proceed against a company in liquidation in an adjudicatory forum other than the winding up court.
G The test is whether the claim can be adequately determined in the winding up court without incurring the time and expense of initiating or proceeding with new proceedings in a separate court. The claim here relates to a straightforward and simply computed debt. The primary issue in determining the quantum relates to limitation. No complex
H issues of law arise in relation to the debt *per se*. Accordingly, the grant of leave to proceed against the company in the Tribunal in respect of a simple monetary claim, contravenes settled principles for the grant of leave.

(ii) More significantly, the preliminary view expressed by the Court of
I Appeal to the effect that by virtue of s. 77 SMA, which uses the phrase 'guaranteed sum', the claim of the management corporation ie, MC, is

no longer an unsecured debt but is accorded priority and elevated to a status/position equivalent to that of a secured creditor. Such a preliminary view was expressed without consideration of the statutory insolvency regime in the Companies Act or the *pari passu* principle in relation to the class of unsecured creditors.

The Competing Submissions Before This Court

[22] The foregoing summary captures the essence of the argument the company put forward before us. It was submitted that the Court of Appeal departed from settled principles of law relating to secured and unsecured debts by advocating the position that s. 77 SMA created a new category of secured creditors outside of the statutory insolvency regime in the Companies Act 2016. The fact of the matter is that the outstanding sum is an unsecured debt and accordingly ought to be dealt with by the winding up court by way of the lodgement of a proof of debt form.

[23] The respondent essentially supported the reasoning and judgment of the Court of Appeal, namely that on a proper construction of s. 77 of the SMA 2013, the outstanding sum is a secured debt. It was further submitted that the issue could not adequately be resolved before the winding up court.

Our Decision

Does Section 77 Of The Strata Management Act 2013 Create A Preferred Or Priority Status Equivalent To A Secured Debt Within The Insolvency Regime?

[24] The Companies Act 1965 (then) and the Companies Act 2016 now in force provide a comprehensive regime relating to the law of insolvency upon a company being wound up. These statutes contain similar statutory provisions in relation to the priority of payments due to secured and unsecured debtors in liquidation. Those provisions are s. 292 under the 1965 Act and s. 527 under the present Companies Act 2016.

Section 292. Priorities.

(1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts:

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred ringgit or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

A (c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in subsection (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

...

[25] Section 292, which was applicable at the material time, provides that **after** the payment of preferential debts, the liquidator acts to safeguard the interests of the unsecured creditors. That, in turn, is ensured by the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors. See: *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47 FC.

[26] Any interpretation which seeks to dislodge these statutory provisions and settled principles of insolvency law cannot be supported. In essence, the questions before us were:

(i) Whether s. 77 of the SMA dislodges or ousts the priority regime as set out in s. 292 of the Companies Act 1965?

(ii) Whether the SMA elevates the payment of the arrears of management fees to the status of a secured debt by reason of the term 'guaranteed' in the said section?

[27] The simple answer to these two questions is that s. 77 has no such effect. It neither dislodges the statutory priority regime in the Companies Act nor elevates the payment of management fees to the status of a secured debt.

[28] We concur with counsel for the company that at best, the word 'guarantee' in s. 77 of the SMA denotes a statutory obligation between the MC and a parcel proprietor, entitling the MC to recover maintenance and other related service charges from a parcel proprietor.

[29] This is reinforced by sub-s. (3) of s. 77 which refers to the sum due from a parcel proprietor to the MC as a 'debt' which is actionable by the MC *vide* a suit filed in court or in the strata tribunal. That right to sue for a debt is a right *in personam* and not a right *in rem*. The MC therefore enjoys a right *in personam* to recover the debt from the parcel proprietor. It goes no further than that.

[30] There is nothing in the language of s. 77 which even makes reference to or purports to oust such insolvency principles. That is because s. 77 was never crafted nor intended to encroach upon, or disrupt the priority regime in the Companies Act. Any provision which seeks to achieve priority can only be done by way of statutory provision and that too, *vide* positive, clear and unambiguous words. It is evident from a perusal of s. 77 that Parliament never intended to displace any part of the statutory insolvency regime.

[31] It served instead to statutorily provide that the non-payment of management fees creates an undisputed debt. The term 'guaranteed' ensures the fact of the existence of such a debt. It ensures that parcel proprietors do not evade their obligations to make such payments. The recovery of such debts is thus assured and can simply be effected under the section.

[32] As such, a reading of s. 77 which purports to accord such a debt priority on a parity akin to a secured debt is to miscomprehend and misconstrue both the effect of the section and the statutory insolvency regime in this jurisdiction.

[33] Ultimately therefore s. 77 was never intended to, and does not go further than ensuring a fail-safe method of recovering management fees as an undisputed debt from parcel proprietors at the behest of the MC.

[34] It follows that when s. 77 is construed in the context of the entirety of the SMA, and in light of the general regime of insolvency law as set out in the Companies Act, the outstanding sum payable to the MC is not a secured debt. It is a guaranteed debt *vis a vis* the company and the MC, which is a different matter altogether. It has no effect on the rights of third party creditors, such as secured creditors or other unsecured creditors.

[35] Our rationale is borne out by s. 292 as well as the importance of the *pari passu* rule in insolvency in relation to unsecured creditors. The MC is such an unsecured creditor. In *Malaysian Trustees Bhd v. Transmile Group Bhd & Ors* [2012] 3 MLJ 679 the sanctity of the rule in insolvency law was expressed as follows:

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> [22] The *pari passu* rule is the cornerstone of insolvency law. It is one of the most fundamental principles of the law of liquidation and is at the very heart of the whole statutory scheme of winding up. It is considered as the most universal of all insolvency principles. It is an old equitable principle that all persons similarly situated are entitled to equality in treatment in the distribution of the assets of the company in the process
B of liquidation (see *McPherson's Law of Company Liquidation* at para 13.100 at pp. 13 -1051 and *Roy Good Principles of Corporate Insolvency Law* at p. 175 para 7.02) ... .

[36] In *Transmile* (*supra*) the Court of Appeal went on to explain that s. 292(1) provides for the distribution of assets in winding up. The liquidator
C is obliged firstly to apply the available unencumbered assets to settle the preferential debts as statutorily provided for and secondly to pay the unsecured debts of the company *pari passu*. As such 'debts of the same class shall rank equally between themselves and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall
D abate in equal proportions between themselves.'

[37] To reiterate, the leave question reads as follows:

> Whether the right of a Joint Management Body or a Management Corporation to collect and receive payment from a proprietor under sections 33 and 77 of the Strata Management Act 2013 respectively, **gives
E it a lawful preference as a secured creditor over the assets of a company in liquidation**? (emphasis added)

[38] For the reasons we have enumerated above, we had no hesitation in answering the sole leave question in the negative.

F *Leave To Commence Or Proceed With Proceedings For Recovery Of The Arrears Of Management Fees*

[39] That brings us to the secondary issue of whether leave ought to have been granted to the MC to enable it to proceed with the recovery of the debt owed to it by the company, or whether it would suffice for the recovery to
G be effected by way of the filing of a proof of debt form in the winding up court.

[40] It is apparent from our analysis above that the use of the word 'guaranteed' in the SMA ensures and assures straightforward recovery of the debt claimed by the MC. The fact of the existence of a debt is easily
H established and payment due 'guaranteed'. What may well remain in issue is limitation. That issue is a matter of law and may be resolved without difficulty. It is certainly not a complex issue that requires adjudication in a court of law. We failed to see any exceptional issue in this case that precluded the respondent from filing a proof of debt in the winding up court.

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[41] As such, the High Court Judge was correct in applying the test he did, premised on the well-known principles cited, *inter alia* in *Mosbert Berhad (in Liquidation) v. Stella D' Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 and more recently by the Court of Appeal in *Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd* [2018] 2 CLJ 401. The test is set out in the old English decision of *Re Cuthbert Lead Smelting Co Ltd* [1886] WN 84 which held that if the party applying for leave could obtain all the relief in the winding up, leave would be refused. If that party's claim cannot however be adequately dealt with in the winding up or if the remedy sought cannot be granted in the winding-up proceedings then leave would be granted.

[42] For the reasons set out above, it is evident in the instant case that recovery of the debt is easily procured in the winding-up proceedings by the filing of a proof of debt form. There is therefore no necessity for the grant of leave.

Conclusion

[43] The reasons we have set out in full in this judgment comprise the basis for the decision we made at the hearing of the appeal. To reiterate, we allowed the appeal, set aside the decision of the Court of Appeal, and restored the order of the High Court. We answered the leave question in the negative.